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In the Supreme Court of the United States

OCTOBER TERM, 1956

EVERETT D. GREEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the Court of Appeals reversing the conviction of second degree murder (R. 7–13) is reported at 218 F. 2d 856. Its opinion, on rehearing *en banc* after retrial (R. 172–188), is reported at 236 F. 2d 708.

JURISDICTION

The judgment of the Court of Appeals was entered on June 28, 1956 (R. 189). The petition for a writ of certiorari was filed on July 27, 1956, and was granted on November 19, 1956 (R. 190). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner, who had been tried for first degree murder and convicted of second degree murder, could be retried on the original charge of first degree murder after the conviction of second degree murder was reversed on petitioner's appeal.

2. Whether petitioner's unappealed conviction of arson bars, on the principle of *autrefois convict*, his conviction of first degree murder on the second trial.

3. Whether a delay of two and one-half days between the time of petitioner's arrest and the time he was taken before a committing magistrate, occasioned by the hospitalization of petitioner for the treatment of his stab wounds, precluded the use, to impeach his credibility, of statements he had made on the first day of his hospitalization.

4. Whether remarks of the government attorney in rebuttal to defense counsel's final summation to the jury were improper and prejudicial to substantial rights of the petitioner.

CONSTITUTIONAL PROVISION, STATUTES AND RULE INVOLVED

The Fifth Amendment provides, in pertinent part:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * *

District of Columbia Code (1951), § 22–401 provides:

> Whoever shall maliciously burn or attempt to burn any dwelling, or house, barn, or stable adjoining thereto, or any store, barn, or outhouse, or any shop, office, stable, store, warehouse, or any other building, or any steamboat,

> vessel, canal boat, or other watercraft, or any railroad car, the property, in whole or in part, of another person, or any church, meetinghouse, schoolhouse, or any of the public buildings in the District, belonging to the United States or to the District of Columbia, shall suffer imprisonment for not less than one year nor more than ten years.

District of Columbia Code (1951), § 22–2401 provides:

> Whoever, being of sound memory and discretion, kills another personally, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22–401 or 22–402 of this Code, rape, mayhem, robbery, or kidnapping, or in perpetrating or in attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree.

District of Columbia Code (1951), § 22–2403 provides:

> Whoever with malice aforethought, except as provided in section 22–2401, 22–2402, kills another, is guilty of murder in the second degree.

Rule 5 (a), Federal Rules of Criminal Procedure, provides:

> (a) *Appearance before the Commissioner.* An officer making an arrest under a warrant issued upon a complaint or any person making

> an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

Rule 31 (c), Federal Rules of Criminal Procedure, provides:

> The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

STATEMENT

1. Petitioner was charged in a two-count indictment returned on July 6, 1953, in the District Court for the District of Columbia with arson and first degree murder in violation of District of Columbia Code (1951), sections 22–401 and 22–2401 (R. 2–3). After trial, he was found "guilty of arson on Count 1" and "guilty of second degree murder on the second count" (R. 3–4). On March 19, 1954, he was sentenced to imprisonment of from one to three years on Count One, and to serve a concurrent term of imprisonment of five to twenty years on Count Two (R. 4–5).

Petitioner appealed from the conviction of murder in the second degree, but did not appeal from the conviction of arson (R. 6). The Court of Appeals, noting that "all the testimony as to what occurred in

the burning house pointed to murder in the first degree and nothing else" (R. 12), reversed the conviction. In concluding its opinion, the court stated (R. 12):

> Here, had the erroneous instruction under which he was convicted not been given, Green might have been found not guilty under the second count. In seeking a new trial at which—if the evidence is substantially as before—the jury will have no choice except to find him guilty of first degree murder or to acquit him, Green is manifestly taking a desperate chance. * * * At oral argument we inquired of his counsel whether Green clearly understood the possible consequence of success on this appeal, and were told the appellant, who is 64 years of age, says he prefers death to spending the rest of his life in prison. He is entitled to a new trial.

After remand of the case by the Court of Appeals, when it appeared that petitioner would be retried on the second count, he moved to dismiss the indictment on the ground that he had once been in jeopardy for the offense charged (R. 15–16). The court denied the motion (R. 17) and the second trial began on May 16, 1955 (R. 17). The motion was renewed before the jury was impanelled (R. 18), at the close of the government's case (R. 138), and again at the conclusion of the defense testimony (R. 150), and was denied each time. The jury returned a verdict of guilty (R. 157–158). Motions for a judgment of acquittal or, in the alternative, for a new trial, were denied by the trial court (R. 17–19, 158, 159, 160). On June 17, 1955, the court sentenced petitioner to

death by electrocution, the mandatory sentence for first degree murder (R. 160–161).

2. On the second trial, the evidence established that fire-fighting apparatus responded to a fire at 1115 Massachusetts Avenue, N. W., Washington, D. C., at approximately 7:40 a. m., Tuesday, May 26, 1953 (R. 20–38). Firemen, on breaking into the smokefilled house, discovered the lifeless body of Betty Brown (R. 124–125), a woman 83 years of age (R. 28), and found petitioner lying face down in a bathtub in the basement in about 2 or 3 inches of water, apparently unconscious and bleeding from several flesh wounds on the upper part of his body (R. 21–27). It was ascertained that Betty Brown died from pulmonary edema caused by the inhalation of hot irritating gases produced by the fires in the burning house (R. 27–37).

Challenged evidence resulting from the subsequent questioning of petitioner by fire and police officers was developed through the government witnesses Kelly and Couture. The testimony was first heard outside of the presence of the jury (R. 43–56; 83–108) at which time petitioner was given full opportunity to testify (R. 57–62). After objections to the admission of this testimony were overruled, the government witnesses were allowed to give their testimony to the jury (R. 68–80; 108–124). Their testimony may be summarized as follows:

After petitioner was removed from the house, he was taken to Emergency Hospital by the rescue squad (R. 24, 55). Police Sergeant Couture of the Homicide Squad, who had arrived on the scene of the fire shortly

after 8:00 a. m. and knew none of the facts, interviewed petitioner about 8:45 a. m. to find out what had happened (R. 83, 94, 108, 125). He found petitioner on an examining table at the hospital (R. 83). Petitioner was suffering from shallow, superficial flesh wounds about the lower part of his chest, one small superficial wound on either side of the neck, and smoke inhalation (R. 63–64). He was clear and coherent (R. 85). Petitioner was not under arrest nor in custody of the police (R. 85).

Sergeant Cotture introduced himself to petitioner as a member of the Homicide Squad (R. 93) and questioned him for about fifteen minutes as doctors and nurses were coming in and out in connection with their duties (R. 86–88). Petitioner said that when he woke up at 7:00 a. m. he smelled smoke and went to the basement to investigate. There, he said, he was attacked by a big colored man who stabbed him several times with a long shining dagger, which was left embedded in his chest up to the hilt (R. 86, 110).

In the meantime, Inspector Kelly of the District of Columbia Fire Department had inspected the burned house and had found evidence that five independent fires had been set, apparently with the use of turpentine (R. 38–39, 41, 128); and that a plug had been removed, apparently with a wrench found on the scene, from a pipe leading into the gas meter, allowing gas to escape (R. 22, 125, 132). He also found a blood covered icepick (R. 125, 131–132), and on a table in the kitchen, a pencil, stationery, and a pair of reading glasses (R. 39, 125, 127).

After his initial fifteen minute conversation with petitioner at Emergency Hospital, Sergeant Couture returned to the scene of the fire. About 10:00 a. m. or a little later the same morning, he returned to the hospital with Sergeant Clarke, also of the Homicide Squad (R. 98, 111, 126). At this time petitioner was still on a table in an examining room and not in police custody (R. 109, 111): His chest wounds had been bandaged (R. 126). The officers asked petitioner how he explained the five fires and the removal of the plug from the gas meter. Petitioner said the colored man must have done it (R. 98, 100–101, 127). When asked by the officers, who had found the glasses and writing materials on the kitchen table, whether he had been writing letters, petitioner said he had not (R. 101). Petitioner could not identify either the wrench or the icepick, although he said he owned several of each (R. 127).

Later the same day, petitioner was taken by ambulance from Emergency Hospital to the District of Columbia General Hospital (Gallinger) (R. 58). He was placed in a large locked ward with about a dozen other patients, a policeman standing guard outside the door (R. 43, 49–50, 68–69). About 3:00 p. m. that afternoon, Fire Inspector Kelly accompanied by Fire Marshal Roberts came to the hospital to talk with petitioner (R. 42–43, 45). Inspector Kelly had previously been told by Police Sergeant Couture at the scene of the fire that it had not been ascertained who had caused the fires. He went to the hospital because petitioner was the only one known to have direct knowledge of the fires (R. 47, 73).

Prior to questioning petitioner, Inspector Kelly asked permission of a policeman to do so. The policeman asked petitioner, who said that was "okay" (R. 43, 45, 47–48). The inspector also asked the nurse if petitioner was in condition to talk and was told it would be all right (R. 48). The fire inspector, accompanied by Fire Chief Roberts, was then admitted to the ward by a nurse (R. 49–50, 74–75). Inspector Kelly shook hands with petitioner as he sat up in bed and questioned him about his injuries (R. 51). During the subsequent questioning, petitioner answered questions freely and voluntarily. No threats or promises were made, and no duress was used (R. 43–44). During the questioning petitioner sat on the side of the bed at times and stood up at other times (R. 53).

Petitioner told Inspector Kelly substantially the same facts about smelling smoke when he had awakened at 7:00 a. m., going to the basement, and being attacked by a colored man who stabbed him with a "long, shiny dagger [that he had] in his hand" (R. 53–54). He said he then crawled to the basement bathroom, ran water in the bathtub, and put his nose close to the water to avoid suffocation (R. 54–55). He stated also that he thought the "colored fellow" who attacked him had set the fires, that after smelling the smoke he had not tried to arouse Betty Brown, and that he had not been writing letters the night before (R. 55).

Inspector Kelly testified that on this visit he talked with petitioner approximately an hour (R. 72). Petitioner, on the other hand, testified that (R. 62) "he wasn't in there three minutes".

At no time during May 27, 1953, the day following the fire, did any fire or police officer talk with petitioner about the fire.

On May 28, 1953, between 9:00 and 9:30 a. m. Sergeants Couture and Clarke and Inspector Kelly again talked with petitioner in the ward at D. C. General Hospital (R. 72).[1] His version of the incident was substantially the same as before (R. 72). When shown the icepick, however, he stated that he then remembered being stabbed with it instead of a dagger, and he also remembered that he had had a hard time pulling it out of his skin (R. 72). Petitioner was shown a letter which the officials had obtained from a Mrs. Anthony after the interview with petitioner on May 26 (R. 179), which he identified and admitted having written (R. 72–73, 79, 113, 129, 134–137). The letter stated (R. 179–180; Gov. Ex. 4–a):

> Tuesday A. M. Please notify W. T. Thompson, Fredericksburg, Virginia, of Miss Betty Brown's death. A fine and good lady, a true friend to me. We both want it this way. Good-bye, my friend.
>
> /s/ EVERETT
>
> Please have my ashes thrown on the Chesapeake Bay (okay) The inclosed is for flowers for her.

It was postmarked Washington, D. C., May 26—12:30 p. m.—1953 (R. 179). Petitioner explained

[1] Defense counsel Ford stated to the court (R. 129), "We are making no objections to this conversation, Your Honor, on the 28th". Previously he had limited his objection to Couture's testimony only in respect to the first interview Couture had with petitioner at "8:30 on the 26th [the day of the fire] at Emergency Hospital" (R. 81). See p. 55 *infra*.

that he had written this letter sometime after midnight before the fire (R. 79, 129).* He then identified the box of stationery taken from the house (which was admitted in evidence without objection (R. 130)).

At 11:00 a. m. the same day (May 28), shortly after the interview with the police sergeants and the fire inspector, petitioner was discharged by the hospital as well enough to leave (R. 63–64). He was taken by the police to the coroner who held him to await the action of the grand jury (R. 62, 180).

3. On appeal, the Court of Appeals affirmed the conviction. On rehearing before the court *en banc*, the majority reaffirmed the conviction, that "We conclude that the *Trono* case [*Trono* v. *United States*, 199 U. S. 521] is authoritative and requires us to hold that Green was not subjected to double jeopardy when, upon remand, he was tried for murder in the first degree" (R. 176) and noting that no true *McNabb* rule problem was present in the case (R. 178). Two dissenting opinions were filed, one rejecting the application of the *Trono* decision to this case (R. 187–188), and the other finding an illegal detention of petitioner (R. 182–187).

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* At the trial petitioner testified that he had gone to bed at midnight before the fire, but had got up sometime thereafter and found Mrs. Brown dead (R. 139). He then got his stationery, wrote the letter admitted in evidence, and mailed it at 25 minutes to 1:00 (R. 140). He explained that when he wrote it (R. 140) "I intended to bump myself off at the time." He testified that he then went back to bed, awoke at 7:00 a. m., and made an unsuccessful attempt to call Mrs. Anthony to whom the letter was addressed to tell her not to pay any attention to it (R. 141–142).

SUMMARY OF ARGUMENT

I

Under an indictment charging, in two counts, arson and first degree murder in the course of committing a felony, the jury at petitioner's first trial returned a verdict of guilty as to the arson and of guilty of second degree murder, which the judge had instructed was a permissible verdict. On appeal from the murder conviction alone, petitioner contended, and the Court of Appeals agreed, that it was error to submit the issue of second degree murder to the jury—that on the facts the only possible verdicts on the first degree murder charge were guilty as charged or acquittal.

A. On these particular facts, there is no basis for petitioner's contention that his appeal from the second degree murder conviction waived jeopardy only to the extent that he was then in jeopardy, *i. e.*, to the extent of second degree murder. The very basis on which petitioner had the second degree verdict set aside precluded his retrial for second degree murder. Petitioner's appeal cannot therefore be said to have sought correction of errors limited to second degree murder.

The jury at the first trial did not intend to acquit petitioner of murder. It is impossible to tell what it would have done had it been properly instructed that it must find first degree murder or acquit. The fact is that both the government and the defendant were prejudiced by the erroneous instruction—the defendant because he might have been acquitted and the government because he might have been found guilty

of first degree murder (as at the second trial). There is thus no foundation for the argument that the jury at the first trial, by its verdict of second degree murder, impliedly acquitted petitioner of murder in the first degree.

Petitioner's argument comes down to the contention that an appeal from his conviction is not a waiver of jeopardy since under his theory he could not be retried at all. The federal rule, however, is well established that a new trial, granted on the application of the defendant, puts him in the position he occupied before trial under the original charge, and makes him vulnerable to the same liabilities as if the case were being tried for the first time. See *Bryan* v. *United States*, 338 U. S. 552, 560.

B. Even in the situation where a defendant is convicted of a lesser included offense which could be established under the same evidence at a retrial, and on his appeal the conviction is reversed, he can, under the rule established in *Trono* v. *United States*, 199 U. S. 521, be retried for the higher degree of crime charged in the indictment. The *Trono* decision specifically held that where a defendant is charged with murder, convicted of a lesser included offense, and takes an appeal to correct the errors of the first trial, he may be proceeded against as though no trial had previously taken place, since the reversal of the judgment of conviction opens up the whole controversy. The Court also specifically rejected the contention, now urged by petitioner, that the defendant may limit his waiver and consent to

retrial only in the degree of the crime of which he was previously convicted.

Petitioner's attempt to distinguish *Trono* by virtue of the fact that it arose from the Philippines is met by the decision itself which was prefaced with the observation that (199 U. S. at p. 530) "[w]e may regard the question as thus presented as the same as if it arose in one of the Federal courts in this country *. * *". His further attempt to diminish its impact by relying on the division of opinion and the fact that Mr. Justice Holmes concurred only in the result is equally without force since Mr. Justice Holmes indicated his *a fortiori* agreement with the relevant principles set forth in the *Trono* ruling, in other opinions both before and after *Trono*.

While the state decisions are divided on the issue, roughly half of the jurisdictions adhere to the *Trono* view. The American Law Institute has recommended against the "limited waiver" theory, especially where the accused contends that his conduct, though constituting the greater offense, does not constitute the lesser offense.

The application of the "limited waiver" theory as a rule of federal law would make serious inroads on the independence of the jury at the second trial. The assumption that a jury tacitly acquits the accused of the greater degree of crime by its verdict in a lesser degree is not a self-evident proposition in view of the role that sympathy and compromise may often play. And where the first verdict was reached after erroneous instructions which prejudiced the government as well as the defendant it would be impossible to calcu-

late the effect such error may have had on the verdict. The "limited waiver" rule proceeds, fallaciously, on the theory that the verdict was tainted only insofar as it found the defendant guilty of the crime charged but was valid insofar as it determined the degree of the crime which was committed. And it forces the second jury to accept the inarticulated conclusions of the first jury, even though the evidence on the second trial may differ.

II

Petitioner's contention that his unappealed conviction of arson under the first count bars, on the principle of *autrefois convict,* his second trial for first degree murder assumes that a person may not be put twice in jeopardy for one transaction. That a single act or transaction may, on the contrary, violate more than one criminal statute, so long as each requires proof of a fact not essential to the other, has been well established as a rule of federal law. *Pereira* v. *United States,* 347 U. S. 1, 9.

A. Arson is not a lesser included offense of first degree felony murder. The gravamen of the crime of felony murder is the homicide. Proof of the felony is the means by which premeditation, necessary to first degree murder, is established. The malice necessary to first degree murder is, both at common law and under the statute, established, either by the showing of actual premeditation, or, in appropriate cases, by the presumption of malice that arises from the commission of a felony. In fact, one of the conditions of proof of felony murder is that the felony relied on must be independent of and not a lesser included

offense of the murder charged. The arson is thus not an integral element of the murder, but is merely evidence relating to the element of felonious intent.

B. The elements of the offense, and not the facts of a particular trial, are determinative on issues of double jeopardy. Since arson is a wholly separate offense from felony murder, the unappealed conviction for arson does not bar retrial for murder.

III

Petitioner challenges the testimony of two government witnesses, that of a police and a fire officer, as to exculpatory statements that he made to them at the Emergency and D. C. General Hospital on the first day of a 2½-day period of hospitalization and before it was possible to take him before the coroner. He argues that such evidence was obtained in violation of the rule of *McNabb* v. *United States*, 318 U. S. 332, a rule excluding confessions obtained from an accused after a period of prolonged illegal police detention. Since petitioner concedes that no coercive tactics were employed, and does not deny that he was unavailable for arraignment during the time he was questioned, his position really comes down to a claim that it was improper, within the rationale of the *McNabb* rule, to question him at all during this period—an extension of that rule which this Court has consistently rejected. *United States* v. *Carignan*, 342 U. S. 36, 44–45.

1. Shortly after the fire, petitioner was removed to Emergency Hospital (a private hospital) and there, while under no police restraint, was questioned

for fifteen minutes by a police officer who had as yet no information identifying petitioner as a suspect, and during routine questioning he gave an exculpatory statement, the substance of which he recounted on the trial. Although he was suffering from superficial stab wounds, the police officer testified he was under no apparent incapacity during this conversation.

2. About two hours later, after it had been determined that the fire might have been caused by arson, petitioner was again questioned by the police officer. Still under no police restraint, he gave substantially the same version of what had happened, and was able to recount at the trial the substance of what he had said.

3. The main thrust of petitioner's *McNabb* argument relates to a conversation petitioner had with Fire Inspector Kelly that afternoon at D. C. General Hospital after petitioner had been put in a bed in a locked ward with about a dozen other patients. Kelly, accompanied by a fire marshal, first obtained petitioner's permission and that of a policeman and the ward nurse to question him. Petitioner was questioned as the only person known to have direct knowledge of the fire, and on this occasion he gave generally the same exculpatory account of what happened as he had previously related. During this questioning he was in the presence of other patients, he sat or stood while being questioned, and no coercive tactics of any kind were used. He testified the fire officers were not in the room as long as three minutes although Kelly testified it was an hour.

Under these circumstances, where there was no illegal or unreasonable detention, no coercion or other improper tactics were employed, and only exculpatory statements were given which were used on the trial for impeachment purposes alone, no mechanical rule should be invoked to exclude such statements solely on the basis of the time when they were given. (*United States* v. *Carignan*, 342 U. S. 36, 44–45). The holding to this effect by the trial judge who considered all the surrounding circumstances in special proceedings outside of the presence of the jury before the evidence was introduced, and that of the Court of Appeals, is amply justified.

IV

Finally, petitioner contends that remarks of the government counsel to the jury were improper in that they attempted to assure the jury that it did not have the final responsibility in capital cases. In the context of the record, however, it is clear that government counsel was merely seeking to correct the misleading impression made by defense counsel that the jury had the final responsibility of imposing the death penalty, and that their findings both as to the fact of the crime and the sentence of death by electrocution was final in the sense of being beyond further review of any other authority. Defense counsel, though given the opportunity, interposed no objection to the summation, nor did he seek correction in the court's charge to the jury.

ARGUMENT

Petitioner contends that his conviction at the first trial of second degree murder was in effect an acquittal of first degree murder, so that, even though the conviction was at his instance set aside, he could not be retried for murder in the first degree. He also argues that his conviction for arson, which was not appealed, bars a retrial for murder in the course of committing arson. Thus he claims double jeopardy both on the grounds of *autr fois acquit* and of *autrefois convict*.

We discuss, in Point I, the defense of *autrefois acquit, i. e.*, the situation presented by the appeal from the second degree murder conviction, without regard to the effect of the arson conviction. In Point II, we treat the problem presented by the appeal from the murder conviction in the face of the unappealed conviction for arson. The remaining two points relating to the trial errors claimed by petitioner are discussed in Points III and IV.

I

PETITIONER WAS NOT PUT TWICE IN JEOPARDY BY THE RETRIAL OBTAINED BY HIM UNDER THE ORIGINAL INDICTMENT CHARGING HIM WITH THE CRIME OF MURDER IN PERPETRATING THE FELONY OF ARSON

The discussion in this point relates to the effect of the conviction for second degree murder at the first trial and petitioner's appeal therefrom, without regard to the unappealed conviction for arson. It is petitioner's argument that the conviction of second

degree murder, although erroneous, nevertheless amounted to an acquittal of first degree murder, with the result that he could not be retried for the higher degree of murder even though he had obtained the new trial on the theory that it was error to submit the issue of second degree murder to the jury. The essence of petitioner's argument is that his appeal waived double jeopardy only to the extent that he was then in jeopardy, *i. e.*, second degree murder, and that it did not waive jeopardy as to first degree murder.

We show first that, whatever validity this argument may have generally in other situations, it cannot apply to the particular factual situation here presented where petitioner's appeal was predicated upon the contention, which the Court of Appeals accepted, that if petitioner was not guilty of first degree murder he had to be acquitted. And then we consider generally the rule that a reversal opens up the whole case so that there may be a retrial for the greater degree of the offense.

A. UNDER THE PARTICULAR FACTS OF THIS CASE, PETITIONER'S APPEAL FROM THE SECOND DEGREE MURDER CONVICTION NECESSARILY IMPORTED A WAIVER AS TO RETRIAL FOR FIRST DEGREE MURDER CHARGED IN THE INDICTMENT

The murder count (the second count) in this case charged murder in the perpetration of the felony of arson. It was not necessary for the government to prove that petitioner intended to kill the victim, but only that in perpetrating the crime of arson he caused her death. *Goodall* v. *United States*, 180 F. 2d 397, 400 (C. A. D. C.). Nevertheless, at the first trial, in submitting the case to the jury under the second count,

the trial judge instructed the jury not only as to the law relating to felony murder, but also as to the law of second degree murder which requires proof of killing with malice aforethought. 22 D. C. Code 2403, *supra*, p. 3. On his appeal after conviction, petitioner contended that since there was no evidence in the record to sustain a conviction of murder in the second degree (*i. e.*, no evidence of intent to kill with malice aforethought) the trial court erred in submitting the question of second degree murder to the jury. The Court of Appeals sustained petitioner's contention, holding (218 F. 2d at p. 857) that "when the evidence at a trial tends to show the defendant committed arson, and that the fire was the sole cause of the victim's death, the defendant is either guilty of murder in the first degree or he is not guilty". The Court of Appeals also pointed out that (*ibid.* p. 859) "in seeking a new trial at which—if the evidence is substantially as before—the jury will have no choice except to find him guilty of first degree murder or to acquit him", Green had been warned of the desperate chance he was taking, but that he had elected to take that chance nevertheless (see the Statement, *supra*, p. 5).

This case is therefore distinguishable from those where a defendant is charged with premeditated murder, is found guilty only of second degree murder, and procures by his appeal a new trial because of a trial error. While even in that situation, as we shall demonstrate (*infra*, pp. 25–47), the entire record is opened up again for whatever disposition a new jury may make, there, unlike here, it would

at least be possible for a new jury to try the defendant for second degree murder. In this case, petitioner asserted, and the Court of Appeals held, that the evidence adduced on the first trial could support only the theory of felony murder, and that the theory of second degree murder was wholly extraneous to the case. Therefore, on a new trial, second degree murder would not be provable under the charge of felony murder.[3]

In these circumstances, it cannot be said that the jury at the first trial, by its verdict of second degree murder, impliedly acquitted petitioner of murder in the first degree. Certainly, it is indisputable that the jury at the first trial did not intend to acquit

[3] In its first opinion in this case (218 F. 2d, 856, 857) and in prior opinions cited therein in footnotes (*Ibid.* p. 857, fn. 3; p. 859, fn. 5), the Court of Appeals refers to second degree murder as a crime "necessarily" included in the crime of felony murder, but then goes on to state that it is includable only if supported by the evidence in a particular case. While this appears to be an inconsistency, what the court apparently means is that in any case where a defendant is charged with felony murder he may nevertheless be found guilty of second degree murder as a lesser included offense if the evidence is sufficient to prove an intent to kill with malice aforethought.

Since felony murder, unlike premeditated murder, does not require proof of intent to kill, under the laws of the District of Columbia (*Goodall* v. *United States*, *supra*, 180 F. 2d at p. 409), it would appear necessary, in order to convict a defendant of the lesser crime of murder with malice aforethought, to include in the charge an additional averment of intent to kill since that additional element of proof would be essential to conviction for second degree murder. See *Evans* v. *United States*, 153 U. S. 584, 594. The second count of the instant indictment did not include such an averment (R. 3).

petitioner entirely of the offense of murder.[4] The instruction given prejudiced both the government and the defendant. It is impossible to tell what the jury would have done had it been properly instructed that it must find first degree murder or acquit. When, therefore, petitioner by his appeal argued that the jury was improperly allowed to consider second degree murder, he cannot be said to have sought correction of errors limited to second degree murder or of errors which were prejudicial only to him.

What he may have hoped for was a dismissal of the indictment. But it is clear that he knew that, if retried, he would be retried for first degree, and not for second degree murder. Therefore, the rationale

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[4] In finding that the defendant committed arson (*i. e.*, was guilty on Count I) and that the death resulted from the fire (a prerequisite, under the evidence in this case, to the finding of second degree murder on Count II), the jury found all the essential ingredients of first degree murder under 22 D. C. Code 401. The verdict of guilty of second degree murder is therefore analogous to the recommendation of "no capital punishment" in *Stroud* v. *United States*, 251 U. S. 15, 18, held not to preclude imposition of capital punishment on retrial. Since the negative implications of the first verdict cannot fairly be read as an acquittal of first degree murder, the basic premise of the plea of *autrefois acquit* fails. See p. 15, fn. 18, *infra*.

In his brief in the Court of Appeals urging reversal of the first conviction, the only relief explicitly sought by petitioner was that the "judgment appealed from should be reversed". Brief for Appellants, p. 26. Petitioner nowhere in that brief suggested that the indictment should be dismissed or that the consequence of reversal would not be a new trial. And see p. 5 *supra*.

Nor does it appear that, at the oral argument, petitioner's counsel told the Court of Appeals that, if dismissal of the indictment or a judgment of acquittal were not to be ordered

that, if he waived double jeopardy, he did so only as to second degree murder cannot fit this particular situation. If petitioner waived the plea of double jeopardy, he necessarily in this case waived it as to the murder which the indictment charged—first degree murder—and which he was urging was the only offense for which he could be tried.

To sustain petitioner's position on the facts of this case would really require a holding that his appeal from the conviction was not at all a waiver of jeopardy—if the conviction were affirmed, he would be in the same position as in the trial court and if there were a reversal he would go free on this charge. The contrary is too well established to require elaboration. A new trial, when granted as the result of action by the defendant, sets aside the original verdict, puts him in a position as though he had never been tried under the original charge, and makes him vulnerable to such fresh disposition of his case as may be just, including a possible increase in his sentence if he is again found guilty. See *Bryan* v. *United States*, 338 U. S. 552, 560; *Stroud* v. *United States*, 251 U. S. 15, 18; *Murphy* v. *Massachusetts*, 177

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by that court, petitioner desired that the conviction for second degree murder should stand—*i. e.*, that petitioner did not desire the Court of Appeals to order a new trial. Petitioner's counsel states that he did inform the Court of Appeals that "any effort to retry petitioner upon the same indictment would raise a problem of double jeopardy" (Pet. Br. 17, fn. 4) but counsel does not say that he informed the Court of Appeals that petitioner would reject an order of remand for new trial (if that should be the judgment of the appellate court), and would prefer to accept the second degree conviction.

U. S. 155, 158; *United States* v. *Ball*, 163 U. S. 662, 672.

B. GENERALLY, REVERSAL ON APPEAL FROM A CONVICTION OPENS UP THE WHOLE CHARGE FOR RETRIAL

Even in the situation where a defendant is convicted of a lesser included offense *which could be established under the same evidence*, and on his appeal the conviction is reversed and remanded for a new trial, he can, under established precedents of this Court, be retried for the higher degree of crime charged in the indictment.

1. The leading case is *Trono* v. *United States*, 199 U. S. 521, where in a Philippine court the defendants, who had been charged with first degree murder, were convicted in the court of first instance of the lesser included offense of assault. The Supreme Court of the Philippine Islands reversed the judgment of the court of first instance and convicted the accused of the crime of homicide (in substance, murder in the second degree), which is included in and is a lower degree of the crime charged in the complaint, but is a higher degree of crime than that of which the accused were convicted in the court below. The defendants argued in this Court that, when they were acquitted by the court of first instance on the charge of homicide, their jeopardy was ended, that they therefore could not again be tried for that offense without being put twice in jeopardy, and that by appeal from the conviction of assault the accused did not waive their immunity from second jeopardy on the charge of homicide.

The main opinion in this Court affirming the judg-

ment below prefaced its discussion of the legal issue involved with the following statement (199 U. S. at p. 530):

> We may regard the question as thus presented as the same as if it arose in one of the Federal courts in this country, where, upon an indictment for a greater offense, the jury had found the accused not guilty of that offense, but guilty of a lower one which was included in it, and upon an appeal from that judgment by the accused a new trial had been granted by the appellate court, and the question was whether, upon the new trial accorded, the accused could be again tried for the greater offense set forth in the indictment, or must the trial be confined to that offense of which the accused had previously been convicted, and which conviction had, upon his own motion, been set aside and reversed by the higher court.

The opinion then specifically rejected the theory advanced in the case of *People* v. *Dowling*, 84 N. Y. 478, 483,* that a defendant may limit his future jeopardy

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*The opinion quoted (199 U. S. at pp. 530–531) the following language of Chief Judge Folger's opinion in the *Dowling* case as stating the opposite viewpoint (84 N. Y. at p. 483):

"The matter at the bottom is the constitutional provision that 'No person shall be subject to be twice put in jeopardy for the same offense (Const. of N. Y. Art. 1, par. 6), and yet new trials are granted in criminal cases on the motion of the accused, and if he gets a new trial he is thus subject to be twice put in jeopardy. This is done on the ground, that by asking for a correction of errors made on the first trial, he does waive his constitutional protection, and does himself ask for a new trial, though it brings him twice in jeopardy. But that waiver, unless it be expressly of the benefit of the verdict of acquittal, goes no further than the accused himself extends it. His application for a correction of

to so much of the judgment as convicted him of guilt, and settled the rule for federal courts as follows (199 U. S. at pp. 531–532, 533, 534):

> And generally, it may be said that the cases holding that a new trial is not limited in the manner spoken of proceed upon the ground that in appealing from the judgment the accused necessarily appeals from the whole thereof, as well that which acquits as that which condemns; that the judgment is one entire thing, and that as he brings up the whole record for review he thereby waives the benefit of the provision in question, for the purpose of attempting to gain what he thinks is a greater benefit, viz., a review and reversal by the higher court of the judgment of conviction. Although the accused was, as is said, placed in jeopardy upon the first trial, in regard not only to the offense of which he was accused, but also in regard to the lesser grades of that offense, yet by his own act and consent, by appealing to the higher court to obtain a reversal of the judgment, he has thereby procured it to be set

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the verdict is not to be taken as more extensive than his needs. He asks a correction of so much of the judgment as convicted him of guilt. He is not to be supposed to ask correction or reversal of so much of it as acquitted him of offense. He, therefore, waives his privilege as to one, and keeps it as to the other. It is upon this principle, that where, by verdict of guilty on one count or for one offense, and an acquittal on or for another, there has been a partial conviction on an indictment, and on writ of error there has been a reversal of the conviction, the acquittal still stands good, and is, as to that count or offense, a bar. As to that, the plea of *autrefois acquit* can be upheld, though the plea of *autrefois convict* cannot be upheld as to the offense of which the verdict was guilty. The waiver is construed to extend only to the precise thing concerning which the relief is sought."

aside, and when so set aside and reversed the judgment is held as though it had never been. This was in substance decided in *United States* v. *Harding, et al.*, tried in the United States Circuit Court in 1846, 26 Fed. Cas. 131, before Mr. Justice Grier, then a member of this court, and this is the ground substantially upon which the decisions of the other courts are placed.

* * * * *

In our opinion the better doctrine is that which does not limit the court or jury, upon a new trial, to a consideration of the question of guilt of the lower offense of which the accused was convicted on the first trial, but that the reversal of the judgment of conviction opens up the whole controversy and acts upon the original judgment as if it had never been. The accused by his own action has obtained a reversal of the whole judgment, and we see no reason why he should not, upon a new trial, be proceeded against as if no trial had previously taken place. We do not agree to the view that the accused has the right to limit his waiver as to jeopardy, when he appeals from a judgment against him. As the judgment stands before he appeals, it is a complete bar to any further prosecution for the offense set forth in the indictment, or of any lesser degree thereof. No power can wrest from him the right to so use that judgment, but if he chooses to appeal from it and to ask for its reversal he thereby waives, if successful, his right to avail himself of the former acquittal of the greater offense, contained in the judg-

ment which he has himself procured to be reversed.

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* * * As there is, therefore, a waiver in any event, and the question is as to its extent (that is, how far the accused by his own action may be deemed to have waived his right), it seems much more rational and in better accord with the proper administration of the criminal law to hold that, by appealing, the accused waives the right to thereafter plead once in jeopardy, when he has obtained a reversal of the judgment, even as to that part of it which acquitted him of the higher while convicting him of the lower offense. When at his own request he has obtained a new trial he must take the burden with the benefit, and go back for a new trial of the whole case. It does not appear to us to be a practice founded on solid reason to permit such a limited waiver by an accused party, while himself asking for a reversal of the judgment.

Petitioner attempts to diminish the impact of the *Trono* decision in two ways. First, he stresses the fact that it arose in the Philippines and did not directly involve a question arising under the Fifth Amendment. This objection however is met by the fact that the Court regarded the question presented as though it had arisen in the federal courts in this country, as the above-quoted excerpt from the main opinion (*supra,* p. 26) demonstrates.[7]

[7] Since a provision of the Civil Government Act forbade double jeopardy in the Philippine Islands, this Court found it unnecessary in *Kepner* v. *United States*, 195 U. S. 100, 124, to

Petitioner also relies on the division of the court in *Trono*. After noting that only Justices Brewer, Brown and Day concurred in the opinion of Mr. Justice Peckham, and pointing out that an equal number of Justices dissented,[8] he stresses the fact that Mr. Justice Holmes concurred only "in the result", arguing from this that the case is not decisive on the issue presented. Though petitioner seeks to read into Mr. Justice Holmes' failure to join in the main opinion a repudiation of its principle, his view on this matter can clearly be discovered in his dissent in *Kepner* v. *United States*, 195 U. S. 100, 134–137, decided a year before *Trono*.

In *Kepner*, which, as previously noted, also arose in the Philippine Islands, the Court held that a defendant who had been acquitted in the court of first instance could not be found guilty and sentenced by an appellate court. Mr. Justice Holmes (with whom concurred Mr. Justice White and Mr. Justice McKenna) dissented. Mr. Justice Holmes observed at the outset (195 U. S. at 134) that—

> The case is of great importance, not only in its immediate bearing upon the administration of justice in the Philippines, but, since the words

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decide whether the constitutional jeopardy provision would have become part of the law of the Islands without congressional legislation. In any event, the Court there, as it subsequently pointed out in *Trono* (199 U. S. at p. 529), regarded the legislative jeopardy provision as *in pari materia* with the jeopardy provision of the United States Constitution from which it was taken.

[8] Mr. Justice Harlan wrote one dissenting opinion, Mr. Justice McKenna joined Mr. Justice White in another dissenting opinion, and the Chief Justice merely "dissented".

used in the Act of Congress are also in the Constitution, even more because the decision necessarily will carry with it an interpretation of the latter instrument.

He then went on to say:

> * * * logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause. Everybody agrees that the principle in its origin was a rule forbidding a trial in a new and independent case where a man already has been tried once. But there is no rule that a man may not be tried twice in the same case. It has been decided by this court that he may be tried a second time, even for his life, if the jury disagree, *United States* v. *Perez,* 9 Wheat. 579; see *Simmons* v. *United States,* 142 U. S. 148; *Logan* v. *United States,* 144 U. S. 263; *Thompson* v. *United States,* 155 U. S. 271, or notwithstanding their agreement and verdict, if the verdict is set aside on the prisoner's exceptions for error in the trial. *Hopt* v. *People,* 104 U. S. 631, 635; 110 U. S. 574; 114 U. S. 488, 492; 120 U. S. 430, 442; *United States* v. *Ball,* 163 U. S. 662, 672. He even may be tried on a new indictment if the judgment on the first is arrested upon motion. *Ex parte Lange,* 18 Wall. 163, 174; 1 Bish. Crim. Law (5th ed.), § 998. I may refer further to the opinions of Kent and Curtis in *People* v. *Olcott,* 2 Johns. Cas. 301; S. C., 2 Day, 507, n.; *United States* v. *Morris,* 1 Curtis, 23, and to the well-reasoned decision in *State* v. *Lee,* 65 Connecticut, 265.
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> If a statute should give the right to take exceptions to the Government, I believe it would

be impossible to maintain that the prisoner would be protected by the Constitution from being tried again. He no more would be put in jeopardy a second time when retried because of a mistake of law in his favor, than he would be when retried for a mistake that did him harm. It cannot matter that the prisoner procures the second trial. In a capital case, like *Hopt* v. *People,* a man cannot waive, and certainly will not be taken to waive without meaning it, fundamental constitutional rights. *Thompson* v. *Utah,* 170 U. S. 343, 353, 354. Usually no such waiver is expressed or thought of. Morever, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States.

It might be said that when the prisoner takes exceptions he only is trying to get rid of a jeopardy that already exists—that so far as the verdict is in his favor, as when he is found guilty of manslaughter upon an indictment for murder, according to some decisions he will keep it and can be retried only for the less offense, so that the jeopardy only is continued to the extent that it already has been determined against him, and is continued with a chance of escape. I believe the decisions referred to to be wrong, but, assuming them to be right, we must consider his position at the moment when his exceptions are sustained. The first verdict has been set aside. The jeopardy created by that is at an end, and the question is what shall be done with the prisoner. Since at that moment he no longer is in jeop-

ardy from the first verdict, if a second trial in the same case is a second jeopardy even as to the less offense, he has a right to go free. In view of these difficulties it has been argued that on principle he has that right if a mistake of law is committed at the first trial. 1 Bish. Crim. Law (5th ed.), §§ 999, 1047. But even Mr. Bishop admits that the decisions are otherwise, and the point is settled in this court by the cases cited above. That fetish happily being destroyed, the necessary alternative is that the Constitution permits a second trial in the same case. The reason, however, is not the fiction that a man is not in jeopardy in case of a misdirection, for it must be admitted that he is in jeopardy, even when the error is patent on the face of the record, as when he is tried on a defective indictment, if judgment is not arrested. *United States* v. *Ball*, 163 U. S. 662. Moreover, if the fiction were true, it would be equally true when the misdirection was in favor of the prisoner. The reason, I submit, is that there can be but one jeopardy in one case. I have seen no other, except the suggestion of waiver, and that I think cannot stand.

If what I have said so far is correct, no additional argument is necessary to show that a statute may authorize an appeal by the Government from the decision by a magistrate to a higher court, as well as an appeal by the prisoner. * * * For the reasons which I have stated already, a second trial in the same case must be regarded as only a continuation of the jeopardy which began with the trial below. [Emphasis added.]

It is apparent, therefore, that Mr. Justice Holmes concurred in the result in *Trono*, not because he repudiated the principles stated in Mr. Justice Peckham's opinion, but because rejection of the "limited waiver" doctrine would follow, *a fortiori*, from his view, expressed in *Kepner*, that double jeopardy did not apply to a retrial of the same case.

As the majority opinion below points out (R. 174–175), there is every indication—including his observations in the *Kepner* case—that Mr. Justice Holmes agreed with the basic rule laid down in the opinion of Mr. Justice Peckham in *Trono*.[9] He cited *Trono* two years later in writing the opinion of the Court in *Flemister* v. *United States*, 207 U. S. 372, for the proposition that a defendant who sought review of

[9] Even the minority view in *Trono* lends no support to petitioner's position in this case. It was based on the theory that "a defendant should not be required to give up the protection of a just (it must be so regarded for the sake of the argument) acquittal of one crime as the price of obtaining a review of an unjust conviction of another crime"; *i. e.*, that the defendant by appealing waived only the particular degree of jeopardy in which his conviction for the lesser offense had placed him, and not a higher degree (199 U. S. at p. 539). Mr. Justice McKenna expressed the view that an "accused would not purposely and consciously appeal from an acquittal of a grave crime and cast from himself the immunity that such an acquittal gives him." (199 U. S. at pp. 538–539.) As pointed out at the outset, that rationale does not apply here. Petitioner appealed from his conviction on the theory that the lesser degree of the offense had been improperly before the jury; he consciously sought a retrial, if a retrial was to be had, only for the greater offense. He therefore did not limit his waiver of jeopardy only to the degree of the offense for which he had previously been convicted. Moreover, on the particular facts of this case, as noted *supra* at p. 23 fn. 4, there has not been a "just * * * acquittal" of the higher crime.

his conviction to the Supreme Court of the Philippines was not put twice in jeopardy when he was reconvicted under another section of the penal code and sentenced to a greater punishment for the same acts. And his position is further evidenced by the fact that he joined in this Court's unanimous opinions in *Brantley* v. *State of Georgia,* 217 U. S. 284, and *Stroud* v. *United States,* 251 U. S. 15, 18, which, as we show *infra,* pp. 37–39, bear on the same issue.

2. The rationale of the *Trono* decision finds support in prior and subsequent federal rulings.

As was pointed out in *Trono,* the principle that an accused in procuring a new trial by his appeal waives his immunity to second jeopardy as to all grades of the offense necessarily included within the charge of the indictment (199 U. S. at p. 532) "was in substance decided in *United States* v. *Harding et al.,* tried in the United States Circuit Court in 1846, 26 Fed. Cas. 131 [Fed. Cas. No. 15,301], before Mr. Justice Grier, then a member of this court." In the *Harding* case the defendants Grimes and Williams were indicted for murder, but were found guilty of manslaughter. After verdict they moved for a new trial on the ground *inter alia* that the verdict was against the weight of the evidence. Subsequent to this argument the district judge died, and defendants applied for similar relief to the Circuit Court. The circuit judges deemed themselves unqualified to pass on the merits of the application, not having had access to the unrecorded evidence, but allowed the defendants to elect whether they wanted to abide by their former con-

victions or to take a new trial under the following admonishment of Mr. Justice Grier (26 Fed. Cas. at pp. 138–139):

> GRIER, *Circuit Justice*, then addressed Grimes and Williams as follows: William Grimes and John Williams—You ought clearly to understand and weigh well the position in which you now stand. You have been once tried and acquitted of the higher grade of offence charged against you in this indictment, the penalty affixed to which is death; but you have been convicted of the minor offence of manslaughter. Your lives have been in jeopardy, and you have escaped. The constitution of your country declares that "no person shall be twice put in jeopardy of life or limb for the same offence." This is to shield you against oppression and injustice, and puts it out of the power of the court to subject you to the danger of another trial, except at your election and request. We believe that you have a right to waive the protection thrown around you by the constitution, for the sake of obtaining what may seem to you a greater good. But let me now solemnly warn you to consider well the choice you shall make. Another jury instead of acquitting you altogether, may find you guilty of the whole indictment, and thus your lives may become forfeit to the law. If you choose to run this risk, and to again put your lives in jeopardy, it must be by your own act and choice, being neither compelled nor advised thereto by the court; and when your solemn election shall have been put on record, the court will hold you forever after estopped to allege that your consti-

> tutional rights have not been awarded to you.
>
> Before we enter of record an order for a new trial as to you, we will give you one week to ponder carefully on this subject, and consult with your counsel as to what will be your safest and best course.

Following *Trono*, the case of *Brantley* v. *State of Georgia*, 217 U. S. 284, came to this Court on writ of error to the Supreme Court of Georgia. Brantley had been indicted for murder, but convicted of voluntary manslaughter, and secured a reversal on appeal. On the retrial he claimed that the prior verdict found him not guilty of murder, and therefore that he could not be again put on trial for murder, but only for manslaughter. The Supreme Court of Georgia affirmed the judgment below which had sustained a demurrer to the plea, basing its decision on the views expressed in *Trono* and alternatively on its construction of the state constitution which provided that "[n]o person shall be put in jeopardy of life, or liberty, more than once for the same offense, save on his or her own motion for a new trial after conviction, or in case of mistrial." *Brantley* v. *State*, 132 Ga. 573, 578, 64 S. E. 676. That court also rejected Brantley's contention that such a result would be contrary to the former jeopardy clause of the Fifth Amendment to the United States Constitution, either as a direct limitation on state action or as part of the due process secured to the defendant by the Fourteenth Amendment (*Ibid.*, p. 679). This Court in affirming the judgment disposed of this constitutional issue as follows (217 U. S. at p. 285), "The contention is ab-

solutely without merit. It was not a case of twice in jeopardy under any view of the Constitution of the United States." Since at that time this Court had not as yet resolved the issue of whether the prohibition against double jeopardy contained in the Fifth Amendment was made applicable in equal degree to state prosecutions by virtue of the due process clause of the Fourteenth Amendment (see *Dreyer* v. *Illinois*, 187 U. S. 71, 8 ; *Palko* v. *Connecticut*, 302 U. S. 319 [10]), the *Brantley* decision necessarily is a holding that under any construction of the United States Constitution in this respect (*i. e.*, whether state action was or was not limited by the jeopardy clause of the Fifth Amendment), Brantley was not twice put in jeopardy under the facts of that case.

While in other decisions this Court has adhered to the general principle established in *Trono* that a defendant may waive his immunity to double jeopardy by seeking review of his conviction (*Stroud* v. *United States*, 251 U. S. 15, 18; *Bryan* v. *United States*, 338

[10] In the *Palko* case, decided in 1937, the state had taken an appeal from a conviction of murder in the second degree pursuant to a state statute allowing appeal by the state in criminal cases when permitted by the trial judge, for correction of errors of law. Upon retrial, the accused was convicted of murder in the first degree and sentenced to death. This Court, in an opinion written by Mr. Justice Cardozo, held that, even if it were assumed that the prohibition of double jeopardy in the Fifth Amendment applied to jeopardy in the same case obtained at the instance of the government rather than the defendant, a like prohibition would not necessarily be applicable against state action by force of the Fourteenth Amendment. Cf. *Brock* v. *North Carolina*, 344 U. S. 424, 426–427.

U. S. 552; and see *Sapir* v. *United States*, 348 U. S. 373, 374 (concurring opinion of Mr. Justice Douglas); *Francis* v. *Resweber*, 329 U. S. 459, 462 (opinion of Mr. Justice Reed)), it has not again had the occasion to reconsider the specific principle that a defendant, in appealing a judgment, waives jeopardy as to all degrees of the crime included within the charge of the indictment under which he was first tried.[11] The lower courts have followed this Court's *Trono* decision where the issue was presented, without questioning its rationale (*Carbonell* v. *People of Porto Rico*, 27 F. 2d 253 (C. A. 1); *United States* v. *Gonzales*, 206 Fed. 239 (W. D. Wash.)).

3. While the state decisions are divided on the issue, roughly half of the jurisdictions[12] adhere to the view that, where on a trial for murder the defendant is found guilty of a lower degree of homicide than the highest degree charged in the indictment, the effect

[11] See, however, Justice Douglas' concurring opinion in *Sapir* v. *United States*, 348 U. S. 373 (1955), a recent decision concerning the propriety of a new trial after a conviction for the same offense had previously been reversed for lack of evidence. Justice Douglas concluded that a court of appeals grant of a new trial on the government's motion, after initially ordering dismissal of the indictment for lack of evidence, violated the Fifth Amendment double jeopardy protection. But he distinguished two situations in which a new trial after reversal for lack of evidence might have been appropriate. Citing *Trono*, he reasoned that if the defendant himself asks for a new trial he "opens the whole record for such disposition as might be just." *Id.* at 374. "Moreover," he continued, "a reversal by the appellate court on a ground of *error that infected the trial* would also be different, as *Palko* v. *Connecticut* * * * shows." *Ibid.* [Emphasis added.]

[12] Note, 66 Yale L. J. 592, 593 (February 1957); Note, 71 U. S. L. R. (N. Y. L. R.) 421, 422.

of granting a new trial on the defendant's motion is to set aside the whole verdict and leave the case for retrial upon the same issues as upon the first trial.[13] The rationale of these decisions has been explained as follows (*State* v. *Bradley, supra,* 32 Atl. at pp. 240–241):

> They say that the necessary result of reversing the judgment and granting a new trial is to set aside the whole verdict, and that, having been done at the instance of the accused, it can neither operate as an acquittal nor a bar to the further prosecution of any part of the crime charged; that, the verdict being set aside, it leaves at issue and undetermined the question

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[13] *E. g., Bohanan* v. *State*, 18 Neb. 57, 24 N. W. 390, dimissal of writ of error refused in 118 U. S. 231; *Gibson* v. *Somers*, 31 Nev. 531, 103 Pac. 1073; *State* v. *Gillis*, 73 S. C. 318, 53 S. E. 487; *State* v. *Ash*, 68 Wash. 194, 122 Pac. 995; *State* v. *Kessler*, 15 Utah 142, 49 Pac. 293; *State* v. *Bradley*, 67 Vt. 465, 32 Atl. 238; *Commonwealth* v. *Arnold*, 83 Ky. 1, 5–6; *Hoskins* v. *Commonwealth*, 152 Ky. 805, 154 S. W. 919; *State* v. *Behimer*, 20 Ohio St. 572; *Kansas* v. *McCord*, 8 Kan. 232; *Perdue* v. *State*, 134 Ga. 300, 67 S. E. 810; *Brantley* v. *State*, 132 Ga. 573, 64 S. E. 676, affirmed, 217 U. S. 284; *Jones* v. *State*, 144 Miss. 52, 109 So. 265; *Watson* v. *State*, 26 Okl. Crim. Rep. 377, 224 Pac. 368; *People* v. *Palmer*, 199 N. Y. 413, 419, 17 N. E. 213; and see collected cases: 59 A. L. R. 1160; 1 Wharton *Criminal Law*, Sec. 397, p. 560 (12th ed. 1932); Note: 71 U. S. L. R. (N. Y. L. R.) 421, 423; Administration of the Criminal Law, A. L. I. (1935 draft) pp. 116–125, and see Miller, *Criminal Law* (Hornbook Series, 1934), p. 543: "Where however, the defendant has secured a reversal of the judgment on conviction and an order for a new trial, he may be tried again on the original indictment for the greater offense charged therein, even though he was convicted on the first trial of a constituent crime of lesser degree. * * * This result follows from the fact that in the latter case there is but a single jeopardy until the case under the original indictment is again tried, defendant's act in securing a new trial being said to constitute a waiver."

> of the homicide, and also the question of whether the accused committed it, if one was committed; that, on the retrial on a plea of not guilty, the legal presumption of innocence prevails, and the state is bound to prove every essential fact; that the only effect, therefore, that can be given to the part of the verdict that acquitted the accused of murder in the first degree after the rest of it has been set aside is to regard it as finding the quality of an act, the existence of which is undetermined, which would be a verdict to the effect that, if the accused committed the homicide, it was not such a killing as made it murder in the first degree, which would be untenable, as there can be no legal determination of the character of the malice of the accused in respect to a homicide that he is not found to have committed, or, rather, of which, under his plea, he is presumed to be innocent. A verdict of murder in the second degree is only an implied acquittal of murder in the first degree; and, if the verdict from which the inference is drawn is set aside, nothing remains to sustain the inference, and the verdict and its incidents fall together, and the indictment is left to stand as to the crime of which the accused was convicted as though there had been no trial. * * *

Those cases which adopt the "limited waiver" doctrine do so either on the basis of a construction of a jeopardy provision contained in a state constitution,[14] a specific statute embodying the "limited

[14] *E. g., State, ex rel., Landis* v. *Lewis*, 118 Fla. 910, 160 So. 485; *State* v. *Harville*, 173 La. 660, 138 So. 435.

waiver" doctrine,[15] or on the general theory that a conviction of a lesser offense on the first trial is necessarily an acquittal of the higher degree of the offense charged.[16] Under this theory, many courts hold that, although a new trial may be brought under the original indictment charging the higher degree of the crime, and new evidence may be introduced to show that the defendant committed the higher degree of the crime, his second conviction must be limited to the degree of the offense of which he was originally convicted, *i. e.*, a finding that the defendant did not commit the crime for which he was brought to trial but a lesser offense included within that charge. See 4 Warren, *Homicide,* Sec. 390, pp. 672–674; Administration of the Criminal Law, A. L. I. (1935 draft), pp. 123–124; and see *Taylor* v. *Commonwealth,* 186 Va. 587, 43 S. E. 2d 906.[17] These cases apparently

[15] *E. g. Cornelius* v. *State*, 54 Tex. Cr. App. 173, 112 S. W. 1050; *Taylor* v. *Commonwealth*, 186 Va. 587, 43 S. E. 2d 906.

[16] *E. g. Hearn* v. *State*, 205 S. W. 2d 477 (Ark.).

[17] The *Taylor* case illustrates the anomolous result obtained in the application of "limited waiver" rule. There, the accused was indicted for murder, was found guilty of involuntary manslaughter, and then took an appeal on the basis of an erroneous instruction given the jury. Under a Virginia statute incorporating the "limited waiver" doctrine as the law of the state, he was thereby acquitted of all greater degrees of homicide. He was again brought to trial *under the same indictment*, and even though on the second trial the state's evidence tended to prove first degree murder with no ameliorating circumstances (which would justify a finding in a lower degree), he was again convicted of involuntary manslaughter under instructions of the court limited to the law of that offense, and his conviction was sustained by the Supreme Court of Appeals of Virginia. And see *People* v. *McFarlane*, 138 Cal. 481, 71 Pac. 568 (conviction of manslaughter upheld though only evidence indicated premeditated murder).

assume, in contrast to the federal rule (*United States* v. *Ball*, 163 U. S. 662, 669; *Stroud* v. *United States*, 251 U. S. 15), that the prohibition against double jeopardy is a limitation on punishment and not merely to the bringing of successive charges of the same crime.

Other cases apparently hold that the defendant may not even be retried under the original indictment but are generally silent as to how the new trial may be instituted. Administration of the Criminal Law, A. L. I., *supra* (pp. 124–125).

In the face of this conflict of state authorities, the American Law Institute has consistently recommended the rule of the *Trono* case as a rule of general application. See Code of Criminal Procedure, A. L. I. (March 16, 1931), Sec. 368; Administration of the Criminal Law, A. L. I. (1935 draft of proposed Act on Double Jeopardy), Sec. 14. Section 1.09 (1) of its more recent Model Penal Code (Tentative Draft No. 5, April 27, 1956) specifically provides that "[a] finding of guilty of a lesser included offense which is subsequently set aside is not an acquittal of the greater inclusive offense." In its comment on this provision, the draft states (*Ibid.* pp. 48–49):

> (4) The draft provides that a conviction of a lesser offense is not an acquittal of the greater inclusive offense. The question is presented when either the defendant or the state appeals and obtains a reversal of the conviction of the lesser offense and, upon the new trial, the state again charges the defendant with the

greater offense. Present authority is conflicting. See A. L. I., Double Jeopardy, (1935) section 14 and commentary at p. 116.

The problem arises most frequently in homicide cases. Courts which hold that a finding of guilty of a lesser included offense which is later set aside nevertheless constitutes a bar to a subsequent prosecution for the higher offense vary in their reasons for reaching that conclusion. * * * In those few jurisdictions whose courts base their decision on constitutional grounds adoption of the draft would presumably require constitutional amendment.

In most cases the circumstances surrounding the reversal of the conviction of the lesser offense make it undesirable to preclude subsequent prosecution for the greater inclusive offense. In those cases where the state obtains a reversal on the ground of prejudicial error at the first trial it is obviously desirable that a prosecution for the greater offense be allowed. The case where the defendant procures the reversal is less obvious. *Where he procures the reversal on the ground that his conduct, though it constitutes the greater offense, does not constitute the lesser offense, subsequent prosecution for the greater offense is certainly warranted.* [Emphasis added.]

The last sentence directly applies to this very case.

This proposed legislation, based on more than fifteen years of study by the American Law Institute, represents an informed judgment, on the working of the conflicting rules, in favor of the present federal rule.

4. The "limited waiver" would, in application, make inroads on the independence of the jury at the second trial.

The assumption that a jury tacitly acquits the accused of the greater degree of crime by rendering a verdict in a lesser degree is not a demonstrated truth. A jury "has the power to bring in a verdict in the teeth of both law and facts" (*Horning* v. *District of Columbia,* 254 U. S. 135, 138), and their findings may be based more on sympathy or compromise, than rigid adherence to the law (*Dunn* v. *United States,* 284 U. S. 390, 393–394).[18] Where, as here, the first verdict was reached after an erroneous instruction to the jurors that they might find the defendant guilty of the lesser crime, it is particularly true that the error tainted the entire verdict; that the Government, as well as the defendant, was prejudiced by the error; and that the consequence of a reversal of the conviction at the defendant's behest should be to permit a retrial of the original charge, free of such error, rather than to insist that the error be perpetuated.

The "limited waiver" theory, moreover, requires the courts to credit not what the first jury actually decided, but what it left unsaid for reasons known

[18] As we have observed, *supra*, p. 23, fn. 4, such possibility exists in the instant case where the first jury found petitioner guilty of arson in the first count and a homicide arising out of the same circumstances in the second. Since the sum total of the facts comprising these two crimes established felony murder, it cannot reasonably be supposed that the jury intended to acquit petitioner of causing the death of the victim in perpetrating arson. It is reasonable to believe that the jury had some motive other than legal consistency—such as sympathy for the petitioner—in reaching its verdict.

only by that jury. It imposes upon the second jury a limitation, arising not from its judgment as to the facts but from the inarticulated conclusions of another jury, not necessarily based on the same evidence.[19]

The verdict rendered on the first trial cannot at the same time be a nullity insofar as it purports to assess a defendant's criminal responsibility for the lesser crime and also constitute a finding that, if he did commit the crime charged, he committed it under ameliorating circumstances which would not justify the imposition of the greater penalty—*i. e.*, there is no proper finding that the defendant murdered the victim, but if he did, it was murder in the second degree.

Whether it be assumed that an accused "waives" his jeopardy by seeking a new trial on the indictment, or whether by appealing he merely extends the original jeopardy to the conclusion of the unresolved case (cf. *Kepner* v. *United States*, 195 U. S. 100, 134, dissenting opinion of Mr. Justice Holmes, *supra*, pp. 31–33), the result is that when he seeks reversal and thereby

[19] To demand that the new trial be instituted under a new indictment rewritten to conform to the lower offense found by the previous jury would place a limitation on the grand jury, especially in those circumstances where the evidence presented to the grand jury is consistent only with proof of the higher degree of the crime. Frequently, moreover, the government is able to procure new evidence of a crime after the first trial. In such cases the application of the "limited waiver" theory would place an artificial stricture on the power of both the grand jury and the new petit jury to weigh evidence not available on the first trial against the charge of the indictment. They would be forced, in effect, to accept a prejudgment of part of the case which might be wholly inconsistent with the evidence presented to them. See fn. 17, *supra*, p. 42.

obtains a new trial he again puts at issue the facts pleaded in the indictment, and renders himself vulnerable to the legal consequences which may flow from a verdict of guilt if the truth of those facts is demonstrated to the second jury. The judgment of the second jury, on the facts before it, ought not to be restricted by speculation as to what the previous jury had concluded in arriving at a verdict on the facts presented to it.

In any event, there are two premises essential to the application of the "limited waiver" doctrine—(1) that, by being convicted of a lesser included offense, the defendant has been acquitted of the greater offense which requires proof of a higher order of criminal intent or of additional facts, and (2) that, in appealing his case, the defendant must be deemed to have intended to waive his immunity to second jeopardy only to the extent of being retried for the degree of crime specified in the previous verdict. As we have demonstrated, neither premise is justifiable in the circumstances of this case, so that the theory of "limited waiver" cannot properly be applied here.

II

PETITIONER'S CONVICTION OF ARSON ON THE FIRST TRIAL WAS NOT A BAR TO HIS RETRIAL FOR FELONY MURDER

Petitioner's contention that his unappealed conviction for arson on the first count of the indictment precludes his retrial for first degree murder on count two is grounded on the false premise that a person may not twice be put in jeopardy for one transaction. He argues that, since there was only one act of arson,

an unappealed conviction of arson bars a subsequent trial for first degree murder arising out of the arson (Pet. Br. 22–25), thereby stressing the act done rather than the nature of the offenses committed. It is, however, well established in federal law that, where different proof is required for each offense, a single act or transaction may violate more than one criminal statute. *Pereira* v. *United States,* 347 U. S. 1, 9; *United States* v. *Beacon Brass Co.,* 344 U. S. 43, 45; *United States* v. *Michener,* 331 U. S. 789; *Pinkerton* v. *United States,* 328 U. S. 640, 643–644; *Blockburger* v. *United States,* 284 U. S. 299, 304; *Gavieres* v. *United States,* 220 U. S. 338, 342; *Carter* v. *McClaughry,* 183 U. S. 365; *District of Columbia* v. *Buckley,* 128 F. 2d 17, 19–20 (C. A. D. C.), certiorari denied, 317 U. S. 658.

As we show *infra,* the crime of arson is not a lesser included offense of first degree murder under the laws of the District of Columbia. The offense of arson is not identical with that of murder committed through the perpetration of arson, and the two crimes cannot "necessarily" be proved under the same evidence. (Rule 31 (c), F. R. Cr. P. *supra,* p. 4.) Hence, the two offenses are separate and distinct.

A. ARSON IS NOT A LESSER INCLUDED OFFENSE IN FELONY MURDER

1. The gravamen of the crime of felony murder is the homicide. Proof of the felony is simply "the element of proof which is necessary in order to convert the killing * * * into first degree murder" and which under the statute supplies "that degree of malice which is indispensable to murder in the first

degree". *Wheeler* v. *United States,* 165 F. 2d 225 299 (C. A. D. C.), certiorari denied, 333 U. S. 829; *Goodall* v. *United States, supra* (180 F. 2d 397 (C. A. D. C.), at pp. 399–400). Arson is not therefore an integral element of murder, but is only a collateral evidentiary fact admissible under the common law (*infra*), and now, by statute, as part of the *res gestae* on the issue of felonious intent. Cf. *State* v. *Barton,* 5 Wash. 2d 234, 105 P. 2d 63, 66; 1 Wharton, *Criminal Evidence* (12th ed. 1955), pp. 508–509. And cf. *Lovely* v. *United States,* 169 F. 2d 386, 388 (C. A. 4).

At common law there was but one crime of murder, admitting of no degrees; and it included killings committed during a felony, malice being implied from the intent to commit the felony. 4 Blackstone *Commentaries* 190, 199–200. It was unnecessary to charge the felony; it was sufficient to charge murder in the common form, and then, upon proof that it was committed in the perpetration of a felony, malice, deliberation, and premeditation were implied. Wharton, *Homicide* (3d ed. 1907), Sec. 574; see also I Wharton, *Criminal Law* (12th ed. 1932), Sec. 520; *Davis* v. *Utah Terr.,* 151 U. S. 262, 266–270.

The District of Columbia first degree murder statute is declaratory of the common law in this respect (*Fisher* v. *United States,* 328 U. S. 463, 473; *Bishop* v. *United States,* 107 F. 2d 297, 301 (C. A. D. C.); *Lee* v. *United States,* 112 F. 2d 46, 49 (C. A. D. C.)). In defining the statutory crime of first degree murder, Congress created only one crime which would be punishable where, under the evidence, there was premedi-

tation or where, as under the common law, there was a homicide committed in perpetrating a felony, from which fact deliberation and malice would be presumed. As before, under an indictment in the common-law form for murder in the first degree, the prosecution may prove facts to bring the case within any of the provisions of the statute defining murder in the first degree. It is not even necessary to allege the fact of a felony in order to introduce proof that the killing was perpetrated in the course of the commission of a felony. *Burton* v. *United States,* 151 F. 2d 17 (C. A. D. C.), certiorari denied, 326 U. S. 789.[20] It is therefore apparent that first degree murder does not include as an integral component the crime of arson.

2. Indeed, one of the conditions of felony murder is that the elements of the felony must be so distinct from those of the homicide as not to be an ingredient of the homicide. *People* v. *Hater,* 184 N. Y. 237, 77 N. E. 6; *People* v. *Spohr,* 206 N. Y. 516, 100 N. E. 444. Many violent murders involve the felony of assault, and yet every such murder does not constitute a first degree felony murder; the assault is usually deemed to merge into the homicide.[21] The rationale

[20] Presumably also an accused could be charged in a single first degree murder count both with premeditation and with killing in perpetrating one or a number of felonies and the charge would not be duplicitous, since only one crime would be charged, murder in the first degree. *State* v. *Barton,* 5 Wash. 2d 234, 105 P. 2d 63, 66.

[21] Even the crime of assault, however, sometimes can supply the felonious intent factor in felony murder. If, for example, A were committing a felonious assault on B, and C intervened and was killed, A would be guilty of felony murder, at least

of this principle has been explained as follows (Arent and MacDonald, *The Felony Murder Doctrine and its Application under the New York Statutes*, 20 Cornell L. Q. 288, 298–299, footnotes omitted):

> Every time a homicide which is not justifiable or excusable is committed, the killer may be said to have been engaged in a felony. To hold him guilty of felony murder, however, would eliminate all existing distinctions between murder and manslaughter and their various degrees. A necessary qualification of the felony murder rule, therefore, is that the felony in which the defendant was engaged must have been independent of the homicide. For a number of years the New York courts struggled with the question whether the felony murder theory could ever be applied where the acts of violence which constituted the felony were the very acts which caused the death. In *Buel* v. *People* it was finally established, however, that a felony murder conviction may be based upon an attempt at rape, even though death was caused by the acts of violence which constituted the felonious attempt, the court pointing out that "While force and violence constitute an important element of the crime of rape, they do not constitute the entire body of that offense." From this developed the present rule that although there need be no acts collateral to or independent of those which caused death, the elements constituting the underlying felony must be so distinct from those

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under the comparable New York statute. See *People* v. *Wagner*, 245 N. Y. 143, 156 N. E. 644; Corcoran, *Felony Murder in New York*, 6 Fordham L. R. 43, 48 (and cases cited).

> of the homicide as not to be an ingredient of the homicide, indictable therewith or convictable thereunder.

Another writer has stated the rule thus (Corcoran, *Felony Murder in New York,* 6 Fordham L. R. 43, 49, footnotes omitted):

> In order, therefore, to constitute a felony murder the elements of the felony must be so distinct from those of the homicide as not to be an ingredient of the homicide, indictable therewith or convictable thereunder. But the killing of a woman during the commission of rape is felony murder. The reason for this is that although violence is an essential ingredient of this felony, there is, in addition to the violence, an element neither essential nor common to homicide, that is, sexual intercourse. If, then, the accused was engaged in the commission of rape, a homicide by him, either of the victim of the rape or of a third party intervening as a rescuer, is felony murder.

And see Wechsler and Michael, *A Rationale of the Law of Homicide,* 37 Col. L. R. 701, 715–716 (1937).

In those cases of felony murder where the felony relied on is a crime against the person of another, it is not essential that the victim or intended victim of the felony be the same as the victim of the homicide, so long as both crimes arise from one criminal scheme. *Carter* v. *United States,* 223 F. 2d 332 (C. A. D. C.), certiorari denied, 350 U. S. 949; *United States ex rel. Almeida* v. *Baldi,* 195 F. 2d 815 (C. A. 3), certiorari denied, 345 U. S. 904; *Commonwealth* v. *Almeida,* 362 Pa. 596, 68 A. 2d 595, certiorari denied, 339 U. S. 924;

Commonwealth v. *Lessner,* 118 Atl. 24 (Pa.); *People* v. *Wagner,* 245 N. Y. 143, 156 N. E. 644. If, for example, A, in the course of robbing B, kills C, he can be tried for the murder of C, and then be tried for the robbery of B arising out of the same transaction. In such a case, it is obvious that the robbery (of B) would not be a constituent offense of the felony murder (of C), although proof of the robbery of B would be essential to raise the crime to first degree murder as to C.

Since arson is even less related to the crime of homicide than rape or robbery and other crimes of violence against the person, it could not be said to merge with first degree murder, even in those cases where the homicide resulted from, and was directly related to, the arson. On a charge of felony murder, the jury would not be entitled to return a verdict for the arson alone. Cf. *Warren* v. *State,* 79 Neb. 526, 113 N. W. 143.

B. THE ELEMENTS OF THE OFFENSE OF ARSON AND OF FELONY MURDER ARE SEPARATE AND DISTINCT

It follows from the principles discussed above as to lesser included offenses that arson is a wholly separate offense from felony murder. The elements of the offense, and not the facts of a particular trial, are determinative on issues of double jeopardy. *Pinkerton* v. *United States,* 328 U. S. 640, 643–644; *Blockburger* v. *United States,* 284 U. S. 299, 304.

Arson is a crime against property; murder a crime against the person. As shown above, the felony is not an element of the offense of felony murder; it is

merely a means of proving one element of the offense—felonious intent. Hence, under established principles—since the elements of each offense are different—the offenses are distinct.

While an acquittal of the charge of arson might have been *res judicata* of that evidentiary fact necessary to proof of murder in the first degree (*Sealfon* v. *United States*, 332 U. S. 575), an unappealed conviction of arson will not support the plea of *autrefois convict* on the retrial of the homicide charge. Compare *Carter* v. *United States*, *supra* (223 F. 2d 332 (C. A. D. C.)); *People* v. *Townsend*, 214 Mich. 267; *State* v. *Moore*, 33 S. W. 2d 905, 326 Mo. 1199; *Commonwealth* v. *Maguire*, 48 N. E. 2d 665 (Mass.); *Durall* v. *State*, 111 Ohio St. 657, 146 N. E. 90. See Administration of the Criminal Law (A. L. I. Official Draft of 1935 Double Jeopardy Statute), *supra*, Sec. 20, "[w]here a severer penalty is prescribed for a homicide because it is committed in the commission of or the attempt to commit another offense a conviction of a person of such other offense is not, subject to the provisions of § 17, a bar to a prosecution of such person for the homicide". A contrary result has been reached only in those state jurisdictions employing "the same transaction" test of jeopardy (cf. *State* v. *Mowser*, 92 N. J. L. 474, 106 Atl. 416; *State* v. *Cooper*, 1 Green 361 (N. J. 1833)), a test which this Court has never adopted. Compare: *Albrecht* v. *United States*, 273 U. S. 1, 11, and cases cited *supra*, p. 48.

III

THERE WAS NO ILLEGAL DETENTION OR IMPROPER QUESTIONING

Petitioner challenges the admission into evidence, to contradict his own testimony at the trial,[22] of statements he made to police and fire inspectors while he was at the Emergency, and D. C. General, hospitals. His objection at the trial went only to statements made on May 26, the day of the fire. Through defense counsel, he specifically waived any objection to the evidence obtained during the questioning period on May 28 (R. 129).[23]

Both courts concluded, properly we submit, that the rule of *McNabb* v. *United States,* 318 U. S. 332,

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[22] Although the government witnesses testified as to petitioner's statements before petitioner's testimony was heard by the jury, "[t]he prosecution, having tried this case before, was familiar with the defense, and these assertions were offered to discredit that defense * * *" (Pet. Br. 31).

[23] See also Transcript p. 232, where, on the *voir dire*, defense counsel stated:

"* * * You see, your Honor, we haven't challenged the 28th. And as I understand the circumstances and facts regarding the taking of the statement on the 28th, they are not in law challenged. So the particular one we are challenging is the one of the 26th, which is the date of the fire. That is why I don't think we ought to take up the Court's time on the 28th, because it is unchallenged * * *."

(References to the typescript transcript of the trial will hereafter be designated "Tr.")

Petitioner singles out four assertions said to have been made by him to government witnesses as highly prejudicial (Pet. Br. 31, fn. 10). Significantly, only the first of these relates to the questioning on May 26, the day of the fire. The other three relate to May 28, and, as to this testimony, as above noted, there was no objection.

excluding confessions obtained during a period of illegal detention was inapplicable to this case. Here, there was neither unreasonable detention nor improper questioning.

Neither petitioner nor Judge Bazelon dissenting below on this issue (R. 182–187) dispute the fact that petitioner was unavailable for arraignment during the time he was questioned. He was under hospital care being treated for his injuries. The tenor of petitioner's argument, and of the dissent below, is that, even so, it was improper to question petitioner so long as he was in the custody of the authorities. This is really an argument for the rule that no person in custody may be questioned, a rule which this Court has consistently rejected. *United States* v. *Carignan,* 342 U. S. 36, 44–45; *United States* v. *Mitchell,* 322 U. S. 65, 69; *McNabb* v. *United States,* 318 U. S. 332.[24]

1. THE QUESTIONING AT EMERGENCY HOSPITAL, ON MAY 26

After his removal from the burning house, petitioner was taken by the fire rescue squad to Emergency Hospital, a private hospital in the District of Columbia, for treatment. Within a short time, Police Sergeant Couture, who had not yet ascertained the details of the fire, appeared, introduced himself, and briefly questioned petitioner for fifteen minutes, as doctors and nurses came and went. Petitioner at this time was under no restraint and had not been identi-

[24] For a general discussion of the *McNabb* rule, see the government's brief in *Mallory* v. *United States,* No. 521, this Term, at pp. 15–25.

fied as a potential suspect. The questioning was merely a routine attempt to get a report on a serious fire.

After the discovery of evidence suggesting arson, Sergeants Couture and Clarke returned to Emergency Hospital at about 10:00 a. m. to question petitioner. Even so, the record does not indicate that petitioner was questioned for purposes other than to check on information. He was not in police custody or under arrest, and had been treated for his injuries. He gave the officers an exculpatory statement, blaming the fire and the removal of the gas plug on a colored man who, he said, had attacked him. He claimed not to be able to identify the various materials found in the house after the earlier questioning by Couture.

No claim is made that any coercive methods were used. Petitioner himself testified that he was not threatened or mistreated at any time by anybody. On the trial the main thrust of his attack was the lack of reliability of what he, as an injured man, told the police officer, and not that his statements had been taken under circumstances of illegality or duress (R. 82).[25] While petitioner, in an apparent attempt

[25] See also Tr. 254, where defense counsel stated:

* * * The issue here is as to his mental and physical condition on May 26, at the time they took the statement, in order to determine whether or not under the law that statement is admissible; so what happened on the 28th doesn't help us to determine that issue as of that date * * *

With respect to this defense contention, the jury was instructed as follows (Tr. 369):

"Certain officers of the law connected with the Fire Department and Police Department of the District of Columbia have testified before this jury that on May 26, 1953, or shortly there-

to discredit the statements attributed to him by the officers, testified (R. 57–62) that he was in poor physical condition and blinded by smoke and soot during the questioning periods on May 26th, Couture sharply controverted this testimony. Couture testified that, when he had briefly questioned petitioner at 8:30 a. m. on May 26th, he was in no distress, and his conversation was normal (R. 87). His eyes were open at this time (R. 87),[26] and Couture did not notice any abnormality in his vision (R. 90–91). He was about the same at 10:00 a. m., the time of the second questioning, and he talked "good" (R. 98).[27] Dr. Brooks of the D. C.

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after the defendant made certain oral statements. The jury are instructed that such oral statements, if freely and voluntarily made by the defendant, *at a time when the defendant was possessed of his senses and knew what he was saying and doing*, should be considered and weighed by the jury in connection with all other evidence in the case as bearing upon the question of the defendant's guilt or innocence. *You are advised that such evidence was received by the Court with caution and should be considered and weighed by the jury with caution.*" [Emphasis added.]

The court went on to elaborate to the jury the requirement that, before considering any statements of the defendant, they must find that they were freely and voluntarily made by him and not the result of coercion. No objection was made to this instruction.

[26] Green told the jury that his eyes were washed out prior to the arrival of Couture, and he looked at the clock and observed that it was then 8:30 a. m. (R. 141). Later in his testimony he said that his eyes had not been washed out when Couture arrived and that he could not open them (R. 145). When questioned as to this discrepancy, he then said it might have been 9:00 a. m. before his eyes were washed out (R. 146).

[27] Sergeant Clarke testified that his chest wounds had been bandaged by this time (R. 126, 137–138).

General Hospital testified that petitioner had sustained only superficial wounds and the effects of smoke inhalation, and made no mention of any eye irritation in his diagnosis (R. 62–68). Petitioner was able on the trial to recount, as to each occasion when he was questioned, the substance of what he told the officers (which did not differ materially from their version of what he said) (R. 61, 146–147, 148–150). Thus, he was fully conscious of what he was saying.

Under the circumstances, there is nothing in either the time or manner of this questioning which violates the standards of proper investigatory behavior or the specific requirements of the *McNabb* rule.

2. THE QUESTIONING AT D. C. GENERAL HOSPITAL, ON MAY 26

The main thrust of petitioner's *McNabb* argument relates to the questioning by Fire Inspector Kelly at 3:00 p. m. on May 26, after petitioner had been taken by ambulance to the public D. C. General Hospital. Petitioner was placed in a large locked ward with about a dozen other patients, a policeman standing at the ward door. Fire Inspector Kelly, accompanied by Fire Marshal Roberts, came to the hospital at 3:00 p. m. or later, for the purpose of obtaining information from the only person who was known to have direct knowledge of the fires. Before questioning petitioner, Kelly obtained his permission, the permission of a policeman, and of the ward nurse. Kelly shook hands with him, and used no coercive tactics in his questioning. During this time petitioner was sitting or standing. His version of the fire was generally the same as he had given Couture five hours

earlier. His account was again exculpatory, placing blame on a colored man alleged to have attacked him and to have set the fires (R. 98, 100–101, 127). Kelly testified that he was in the room an hour, although petitioner testified that he was not in there as long as three minutes (R. 62).

There is, as to this period, nothing but the fact of closer custody than at Emergency on which to predicate a *McNabb* argument. Petitioner was in no condition to be arraigned prior to this release from medical treatment. The holding was not for the purpose of questioning him as in *Upshaw* v. *United States,* 335 U. S. 410. Petitioner was, in fact, not questioned at all on May 27 when he was kept in the hospital for treatment.

The questioning, on May 26, in the presence of 12 other patients, was not secret grilling. It was admittedly noncoercive. Petitioner himself was under the impression that it was for a very short period.

Under these circumstances, the situation presented is analogous to that in *United States* v. *Carignan,* 342 U. S. 36, where the Court refused to extend the *McNabb* rule to a confession obtained from a person validly in custody under another charge. Here, petitioner was validly in limited custody for the treatment of his injuries. The brief, noncoercive questioning during that period was proper. As this Court said of the *Carignan* situation, 342 U. S. at pp. 44–45, "[t]his case falls outside the reason for the rule, *i. e.*, to abolish unlawful detention", and "[a]n extension of a mechanical rule based on the time of a

confession would not be a helpful addition to the rules of criminal evidence". And see *On Lee* v. *United States*, 343 U. S. 747, 755;—"[s]uch departures from the primary evidentiary criteria of relevancy and trustworthiness must be justified by some strong social policy". There was in this case no improper behavior which would warrant exclusion of petitioner's statements.

IV

THE PROSECUTOR'S OBSERVATIONS AS TO THE PROPER FUNCTION OF THE JURY WERE MADE IN REBUTTAL TO ERRONEOUS AND PREJUDICIAL STATEMENTS OF DEFENSE COUNSEL, AND DID NOT MISLEAD THE JURY

It is petitioner's final contention that the remarks of the prosecutor to the jury in summation of the case were improper in that they attempted to assure the jury that it did not have the final responsibility in capital cases (Pet. Br. 36–41). Considered in context, however, the remarks of government counsel merely sought to correct the misleading impression made by defense counsel that the jury had final responsibility for imposing the death penalty, and that their findings both as to the fact of the crime and the sentence of death by electrocution were final in the sense of being beyond further review by any other authority. The facts may be briefly summarized as follows:

During his summation, defense counsel Ford told the jury that their finding of fact was final and neither the Supreme Court of the United States nor anyone else (R. 153) "can hold you to their opinion

on questions of fact, for you are the sole judges of the facts". He further stated in this vein (R. 153):

> No one on the face of the earth can challenge your individual decision on what you consider the facts to be.

He then went on to give the impression that the jury was to determine whether the petitioner would be electrocuted or not.[28] Thus, he stated (Tr. 600):

> Each of you will vote on that direct issue: Is he guilty of first degree murder as charged, and then he goes to the electric chair, and nothing will stop it. It is mandatory.

He then repeated this theme several times in his argument, *e. g.*:

> [Tr. 601] * * * if after my discussion of that you come to the factual opinion that this man should not go to the electric chair * * *.
>
> [Tr. 602] * * * before I can send him to the electric chair, I have to say to myself I have no reasonable doubt about what caused the death of this lovely lady * * *.
>
> [Tr. 662] * * * even though you are morally certain that he set all the fires, you still, under our law, must say not guilty and not send him to that chair.
>
> [Tr. 605] Yes, under your solemn and sacred oath, shall I, as a juror, send that kind of a human being to the electric chair * * *.

After the latter statement, government counsel stated (Tr. 605):

[28] Prior to making this statement, defense counsel had told the jury that that day was a holy day, Ascension Thursday (Tr. 598), and he repeated this observation later in his argument (Tr. 623).

> Your Honor, I don't want to interrupt Mr. Ford, but the jury doesn't send the defendant anywhere.

Defense counsel Ford concluded his summation as follows (Tr. 624):

> First degree murders [sic] don't live the way he and that lady lived. And I am sure she herself, if she could speak to you, would tell you, For my death you are going to the electric chair? Why, he lifted me in and out of bed during the years. He fed me. He clothed me. Ladies and gentlemen, it just can't be.

The total effect of defense counsel's remarks was to create the impression in the minds of the jurors that they were to impose sentence as well as to determine the facts, and that the case in both respects ended with their verdict.

To offset this impression, government counsel told the jurors during argument in rebuttal that their duty (R. 153) "doesn't consist in sending this defendant to the electric chair", but (R. 153):

> * * * Your duty as representatives and members of this community is to sit here, listen to the facts, take the law that His Honor will give you which governs this case, and then in accordance with the facts and with the law, to reach a fair and impartial verdict based on the evidence and the law, and on nothing else.

The prosecutor explained that the sentencing authority is vested in the trial judge, that the facts of the case which determine the legitimacy of the sentence may be reviewed on appeal, and that, in addition, the possibility of executive clemency existed.

The prosecutor did not tell the jury that the responsibility for determining guilt or innocence was not theirs, but sought to explain the difference between that function, and the sentencing function. That is evidenced by his concluding remarks, (R. 154–155):

> * * * So bear in mind, ladies and gentlemen, and bear in mind your function in this case is [sic] fact-finders. You are the fact-finders. You have to decide: (1) Did Green set the fire? (2) Did Miss Betty Brown die as the result of the fire? And that ends your function in the case, and the responsibility of other people comes into it when we consider the answer or consequences as to what is going to happen to this man.
>
> * * * * *
>
> Now with this, ladies and gentlemen, I will leave the case with you.
>
> I want to emphasize again your function, your responsibility in the case. Your responsibility is to make a finding on the facts and the law as to whether or not this man set the fire and whether or not this woman died as a result of it. Your function is not to send this man to the electric chair. I want to emphasize that, ladies and gentlemen, and that should not properly be a matter for your consideration. The consequences or the result of your verdict is something that you are not concerned with or should be concerned with.
>
> As I say, there is the Judge in this case, the Court of Appeals, the Supreme Court, the President, The Attorney General, and I am sure this man's rights will be protected all the way along the line. It is the responsibility of these

> other people to decide what to do with this man and not you, and I am sure his rights will be protected all along the line.

It is pertinent to note that no objection was taken to this argument in rebuttal at the time, and although defense counsel was given an opportunity by the court to submit any further instructions, including presumably an instruction to cure this alleged error, he failed to have it corrected by the court (Tr. 645–647).

In context, the prosecutor's explanation to the jury of the relationship of their duties to the duties of the reviewing and sentencing authorities was proper. Remarks that might be considered as improper when standing alone acquire a new cast when viewed with reference to matters raised by opposing counsel's arguments. *Schino* v. *United States,* 209 F. 2d 67 (C. A. 9), certiorari denied, 347 U. S. 937; *Ochoa* v. *United States,* 167 F. 2d 341, 344, 345 (C. A. 9); *United States* v. *Johnson,* 165 F. 2d 42, 48–49 (C. A. 3), certiorari denied, 332 U. S. 852; *Springer* v. *United States,* 148 F. 2d 411, 414 (C. A. 9),

Moreover, as we have indicated, petitioner's counsel made no objection to the prosecutor's rebuttal argument nor did he ask the trial court in its instructions to correct the alleged error. It was not until the defense motions for judgment of acquittal and a new trial were made that the court's attention was called to this issue (R. 158–159). The proper time to object to a prosecutor's remarks is when they are made, so that the alleged error can, if possible, be corrected. *Crumpton* v. *United States,* 138 U. S. 361,

364; *Kreinbring* v. *United States*, 216 F. 2d 671, 673 (C. A. 8); *United States* v. *Kortepeter*, 114 F. 2d 124, 128 (C. A. 7), certiorari denied, 311 U. S. 711; *Jarvis* v. *United States*, 90 F. 2d 243, 246 (C. A. 1); *Mendelson* v. *United States*, 58 F. 2d 532 (C. A. D. C.); *McIntosh* v. *United States*, 1 F. 2d 427, 429 (C. A. 7).

In this case, where the evidence of petitioner's guilt was clear, and its sufficiency is not here challenged, the remarks of the prosecutor complained of, even if they did not correctly inform the jury as to the exact nature of appellate review, do not constitute the type of plain error which would warrant reversal under Rule 52, F. R. Crim. P. Cf. *Wheeler* v. *United States*, 190 F. 2d 663 (C. A. D. C.); *McFarland* v. *United States*, 150 F. 2d 593 (C. A. D. C.).

CONCLUSION

It is respectfully submitted that the judgment of the court below should be affirmed.

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